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IN THE

Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., ET AL.,

Petitioners,

v.

JEFFREY BOOK, D.O., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PUBLIC CITIZEN, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether it would violate public policy to require a party to arbitrate a RICO claim under an arbitration agreement that does not allow the arbitrators to grant the remedies provided by statute for such a claim.

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INTEREST OF AMICI CURIAE[1]

Amicus curiae Public Citizen, Inc., is a non-profit advocacy group with more than 135,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Among Public Citizen's principal concerns is the protection of the rights of consumers and employees, particularly in their dealings with large corporations. Increasingly, consumers are forced, as a condition of routine transactions such as obtaining credit cards, long distance telephone service, and insurance, to enter into form arbitration agreements, the terms of which are typically non-negotiable from the standpoint of the individual consumer. Similarly, more and more employees are compelled to agree to arbitration of employment disputes as a condition of employment. For employees who are not represented by unions in a collective bargaining environment, those arbitration agreements are generally not subject to meaningful negotiation either. And, because of the ubiquity of arbitration agreements in the securities industry, the millions of small investors whose savings for retirement and their children's education are invested in the stock market are also, for the most part, parties to agreements with arbitration clauses that they had no opportunity to negotiate.

Thus, many citizens are effectively forced to rely on arbitration rather than the judicial system, at least in the first instance, for the vindication of their rights—including not only common-law rights but also rights under a variety of federal statutes intended to protect them against discrimination, fraud, and other forms of commercial overreaching. It is therefore essential, if the objectives of such laws are to be

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[1] Letters of consent from both parties to the filing of this brief have been filed with the Clerk. This brief was not authored, in whole or in part, by counsel for a party, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

fulfilled, to ensure that arbitration agreements, if they are to be enforced, provide full protection to rights granted by law. Arbitration clauses that discriminate against or deny full enforcement of the legal rights of the parties—for example, by denying remedies granted by federal law—are inimical to the protections that Public Citizen has fought to establish for consumers and employees. Because the arbitration clause the petitioners seek to enforce in this case would have precisely that effect, Public Citizen submits this amicus curiae brief in support of the respondents.

SUMMARY OF ARGUMENT

The issue in this case is whether arbitration agreements that purport to cover claims under RICO but expressly deny arbitrators the power to award the form of relief provided for in that statute—that is, treble damages—may be enforced to compel arbitration of RICO treble damages claims. Both the district court and the Eleventh Circuit correctly held that such arbitration agreements violate public policy to the extent they purport to compel arbitration of statutory claims but deny the remedies provided by statute.

Enforcement of a predispute arbitration agreement that bars remedies provided by federal statute would amount to giving effect to a prospective waiver of substantive statutory rights. Although most statutory rights may be waived under appropriate circumstances (such as the knowing and voluntary settlement of claims based on past actions), *prospective* waivers of substantive rights have generally been held to be invalid by federal courts because they tend to encourage (or underdeter) statutory violations and thus undermine the public policies expressed in the statute.

For this reason, this Court has consistently and repeatedly emphasized that the enforcement of arbitration agreements presupposes that the parties will be able to obtain full vindication of their rights in the arbitration process, and it has expressly stated that it would not hesitate to find an arbitration

clause that purported to deny a party substantive rights guaranteed by federal law to be void as against public policy. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The same consideration has led the nation's leading arbitration organizations to provide expressly in their rules that, contrary to the arbitration agreements at issue here, arbitrators must be free to provide all forms of relief available under the law.

The limitation on remedies incorporated in the agreements at issue is, accordingly, unenforceable. The remaining questions are whether the courts, as opposed to the arbitrators, have the power to say so, and when they may do so. The answer to the first question is clearly yes: Declaring the validity of the arbitration agreement itself is traditionally the role of the courts, and, indeed, the parties could not reasonably have contemplated that the arbitrators themselves would determine whether or not to disregard purported contractual limitations on their authority. As to the timing of the enforceability decision, the appropriate time is before the parties are compelled to go forward under a flawed arbitration scheme—particularly given that the nature of the arbitration process and of judicial review of arbitration awards may render post-arbitration review ineffective.

ARGUMENT

I. WAIVERS OF SUBSTANTIVE STATUTORY REMEDIES IN PREDISPUTE ARBITRATION AGREEMENTS ARE UNENFORCEABLE.

A. Prospective Waivers of Substantive Rights and Remedies Under Federal Statutes Such as RICO Violate Public Policy.

Although petitioners and their supporting amici seek to avoid the issue in a number of ways, their argument, at bottom, is that it is perfectly all right to enforce an agreement under which a party prospectively waives the right to obtain remedies for violations of federal law that have not yet oc-

curred.[2] In particular, they argue that a party may be held to a purely prospective waiver of RICO remedies. In other words, petitioners assert that if, in the future, they subject others to injuries resulting from a pattern of violations of federal criminal laws such as mail and wire fraud and extortion, their victims can be barred by contract from seeking the remedies provided by federal law for such violations.

Petitioners rely on decisions of this Court that have sustained waivers of statutory and even constitutional rights. The cases, they assert, stand for the principle that nearly any right may be waived under nearly any circumstance. But the Court's actual holdings have not been so broad. What the Court's holdings on waiver establish are two narrower, common-sense principles. First, procedural rights, including

[2] Petitioners and their amici attempt to argue in the alternative that this issue need not be reached because, they say, the agreements at issue, which bar punitive and "extracontractual" damages, do not really bar treble damages under RICO. Contrary to their suggestion, however, that is not an issue that turns on the nature of RICO treble damages as a matter of federal law. Rather, it is a question of contractual interpretation: What did the parties mean when they used the terms "punitive damages" or "extracontractual damages" in their contracts? The petition for certiorari in this case did not ask the Court to resolve that factbound question of state contract law and, in any event, it is not worthy of this Court's consideration. Moreover, it has been decided against petitioners by two lower courts, and under this Court's venerable "two-court rule," those decisions should not be disturbed here. *See, e.g., Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). In any event, whether RICO treble damages are "punitive" or not (*cf. Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000) (treble damages under qui tam statute are "punitive")), the remedies available under RICO are certainly "extracontractual" under any plausible interpretation of the term: They are essentially tort remedies; a party's entitlement to them is not based on contract; the pre-trebling amount is not limited by legal doctrines that restrict damages for breach of contract; and the trebling of the damages is not dependent on contractual authorization.

rights of both civil and criminal procedure established by the Constitution, may generally be waived, at least in the course of a proceeding to which they would otherwise apply. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196 (1995) (holding that a defendant may waive the rule of evidence forbidding admission of statements made in plea negotiations); *New York v. Hill*, 528 U.S. 110 (2000) (holding that a defendant may waive procedural rights under the Interstate Agreement on Detainers). Second, most substantive rights and remedies may be waived as part of the settlement of an extant dispute, provided the waiver is knowing and voluntary. *See Evans v. Jeff D.*, 475 U.S. 717 (1986) (upholding waiver of right to attorney's fee as part of settlement of civil rights case); *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (waiver of civil rights claim in exchange for dropping criminal charges is enforceable if knowing and voluntary). There are, of course, limits even to these propositions: Some procedural rights may be unwaivable, *see Hill*, 528 U.S. at 116-17; *United States v. Olano*, 507 U.S. 725, 741 (1993) (Kennedy, J., concurring), and this Court has held that some substantive statutory remedies may not be waived even retrospectively, *see Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) (right to double damages for FLSA violations).

Notably, the cases cited by the petitioners and their amici do not uphold *prospective* waivers of substantive statutory rights.[3] That is no accident, for this Court and the lower courts have generally been unwilling to tolerate such waivers. This Court has held, for example, that an employee's rights under Title VII and similar antidiscrimination laws cannot be prospectively waived:

> To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. ...

[3] *See, e.g., Hill*, 528 U.S. at 115 ("This case does not involve a purported prospective waiver of all protection of the IAD's time limits or of the IAD generally, but merely agreement to a specified delay in trial.").

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. ... [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974).

This principle is not limited to Title VII or antidiscrimination laws, but reflects a broader view that where a federal statute imposes a duty or standard of conduct and creates substantive rights and remedies to enforce that standard, private parties may not enter into contracts that prospectively exempt themselves from the statutory scheme. Thus, for example, this Court has also held that parties may not, by contract, free themselves from substantive obligations (and liabilities) under the Fair Labor Standards Act, *see, e.g., Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740-41 (1981); *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1945), or the federal securities laws, *see Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) ("[A] customer cannot negotiate a reduction in commissions in exchange for a waiver of compliance [by a broker] with the requirements of the Exchange Act, even if the customer knowingly and voluntarily agreed to the bargain."); *Wilko v. Swan*, 346 U.S. 427, 434 (1953).[4]

Similarly, the lower federal courts have held unenforceable or invalid a variety of agreements that seek to relieve a

[4] *Wilko*'s holding that securities claims may not be subject to predispute arbitration agreements at all has, of course, been overruled, *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), but the *Wilko* Court's condemnation of a contractual provision that would have relieved a broker of liability under the securities laws for any "representation or advice" (346 U.S. at 434) has not.

party prospectively from liabilities otherwise imposed by federal law. The Seventh Circuit, in a decision holding unenforceable a contractual provision that would have anticipatorily excused a defendant from liability under the Commodity Exchange Act, explained the underlying principle at work in such cases (and why they differ from cases involving retrospective waivers, such as *Evans v. Jeff D.*): "The waiver of substantive statutory rights after the violation has occurred is akin to a settlement of the dispute, but prospective waivers of statutory rights tend to encourage violations of the law by notifying the wrongdoer in advance that he or she can act with impunity; therefore prospective waivers uniquely can violate public policy." *Cange v. Stotler & Co.*, 826 F.2d 581, 594 n.11 (7th Cir. 1987).

Thus, the Second Circuit has held that "a firm cannot buy from a worker an exemption from the substantive protections of the anti-discrimination laws because workers do not have such an exemption to sell, and any contractual term that purports to confer such an exemption is invalid." *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 117 (2d Cir. 2000); *accord, e.g., McCaskill v. SCI Management Corp.*, 298 F.3d 677, 684-86 (7th Cir. 2002) (employee cannot prospectively waive right to attorney's fees under Title VII) (concurring opinion); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (employees cannot waive substantive protections of Title VII by agreeing to arbitration clauses); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) (employees may not waive Title VII rights that have not yet accrued).

Similarly, the Eleventh Circuit has held that borrowers may not prospectively waive their substantive rights under the Truth in Lending Act, *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178 (11th Cir. 1982).[5] Likewise, the Fifth

[5] *Parker* also highlights out that a prospective waiver of remedies for future statutory violations will generally not be a "knowing" waiver, as

(*Footnote continued*)

Circuit, in a case later cited with approval by this Court, has stated that enforcement of an agreement prospectively waiving remedies against future antitrust violations would be "clearly against public policy." *Redel's Inc. v. General Electric Co.*, 498 F.2d 95, 99 (5th Cir. 1974) (cited in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 637).

B. This Court's Decisions Do Not Allow Arbitration Agreements to Waive Substantive Rights and Remedies.

A predispute arbitration agreement necessarily involves a prospective waiver of some rights—specifically, certain of the procedural rights, such as the right to trial by jury, that accompany litigation of a claim in a judicial forum. But that prospective procedural waiver is effective (at least in cases that arise out of transactions involving commerce) only because Congress has specifically so provided in the Federal Arbitration Act, 9 U.S.C. § 2, which makes such contracts enforceable. The enforceability of prospective agreements to arbitrate, however, in no way implies the enforceability of prospective limits on the substantive rights and remedies that can be vindicated through arbitration. Indeed, as this Court has repeatedly stated, the enforcement of an agreement to arbitrate a particular claim is acceptable only because and to the extent that the parties' substantive rights can be fully vindicated in arbitration.

Thus, while holding that antitrust claims are subject to arbitration, the Court expressly stated that if the arbitration agreement "operated … as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19. The

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the person making the waiver may be unaware not only of the nature of her statutory rights, but also of the future conduct that may infringe them. *See* 673 F.2d at 1182.

Court repeated the point in exactly the same words in *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995), in holding that claims under the Carriage of Goods by Sea Act were arbitrable. And in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), while holding claims under the Age Discrimination in Employment Act were subject to arbitration, the Court emphasized that the agreement to arbitrate did not involve the waiver of any substantive rights under the Act and that the rules of the arbitration did not limit the arbitrators' power to grant the full range of equitable and legal remedies to which the claimant might be entitled. *Id.* at 26, 30. Similarly, in *McMahon*, the Court held securities and RICO claims arbitrable because arbitration of such claims does "not entail any consequential restriction on substantive rights," 482 U.S. at 232, and plaintiffs can "effectively vindicate" both securities claims and RICO treble damages claims in arbitration. *Id.* at 242.

The Court summarized the teachings of these cases just last Term in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). There, while holding that an individual employee's agreement to arbitrate disputes could not bar the EEOC from exercising its statutory power to file a lawsuit based on the employee's grievances, the Court explained the rationale of—and limits on—its prior holdings that statutory claims may be subject to arbitration. The Court's language leaves no doubt that prospective waivers of substantive statutory rights are not enforceable merely because they are contained in arbitration agreements:

> We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum. "In these cases we recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"

Id. at 296 n.10 (quoting *Mitsubishi*, 473 U.S. at 628, and *Gilmer*, 500 U.S. at 26). The Court emphasized that an arbitration clause is "effectively a forum selection clause" rather than a waiver of statutory remedies, and it emphasized that any attempt to find a substantive waiver in an arbitration agreement "obscure[s] this crucial distinction and [runs] afoul of our precedent." *Id.* at 295, 296 n.10.

C. The Nation's Leading Arbitration Organizations Increasingly Reject Efforts to Limit Substantive Rights and Remedies in Arbitration.

Petitioners and the amici who support them suggest that arbitration will somehow be crippled if enforcement of arbitration agreements that waive substantive statutory rights and remedies is denied. As explained above, that submission conflicts with the public policy against enforcement of such waivers and the limits this Court has placed on the acceptability of arbitration agreements in such cases as *Waffle House* and *Mitsubishi*. In addition, petitioners' contention runs counter to the growing recognition by leading organizations that actually administer arbitration agreements that the enforcement of such waivers of substantive rights is unfair and inappropriate.

The American Arbitration Association, for example, recently amended its rules to provide expressly that the remedies an arbitrator may grant in consumer arbitration cannot be limited: The Association's Rule C-7(c) states that an "arbitrator may grant any remedy, relief or outcome that the parties could have received in court." American Arbitration Association, Supplementary Procedures for Consumer-Related Disputes, Effective March 1, 2002 (available at www.adr.org). Similarly, JAMS, another leading arbitration organization, has adopted a "Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses," which provides, in relevant part:

> Minimum Standards Of Procedural Fairness
>
> JAMS will administer arbitrations pursuant to predispute arbitration clauses between companies and individual consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness.
>
> * * *
>
> Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the unavailable remedies in court.[6]

The New York Stock Exchange and the National Association of Securities Dealers, both of which offer securities arbitration under rules approved by the SEC, also foreclose limits on remedies by providing that their members may not use predispute arbitration agreements with customers that "include any condition which … limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award."[7] As a result, securities arbitrations conducted by the NASD and NYSE regularly include claims for punitive damages, statutory treble damages, and similar remedies. The NASD has also adopted special rules for the arbitration of employment discrimination disputes, which provide that in arbitration of such claims, "[t]he arbitrator(s) shall be empowered to award any relief that would be available in court under the law," including attorney's fees "as part of the remedy in accordance with applicable law."

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[6] The JAMS policy is available on its website, www.jamsadr.com.

[7] Constitution of the New York Stock Exchange, Inc., Article IX, Rule 636(d) (available at www.nyse.com/arbitration); NASD Rule 3110(f) (available at www.nasd.org).

NASD Code of Arbitration Procedure, Rules 10214, 10215 (available at www.nasdadr. com).[8]

Any suggestion that enforcement of agreements purporting to waive substantive rights and remedies is essential to the vindication of the interests arbitration is supposed to serve is flatly contradicted by these standards and rules, which have been put in place by some of the nation's leading sponsors of arbitration. Rather, the policies of these organizations reflect a recognition of the same principle asserted by this Court in *Waffle House* and *Mitsubishi*: that it is unfair and wrong to permit arbitration agreements to be used to give effect to prospective waivers of substantive rights created by law.

II. IT IS FOR THE COURTS TO DETERMINE THE ENFORCEABILITY OF ARBITRATION AGREEMENTS THAT PURPORT TO WAIVE SUBSTANTIVE RIGHTS.

Petitioners and their supporting amici urge that even if the contractual terms prohibiting arbitrators from granting respondents the remedies provided by statute for a RICO violation are unenforceable, the issue of the validity of that limit on the arbitrators' authority should be decided in the first instance by the arbitrators. That argument runs counter not only to decades of this Court's precedents, but, even more pointedly, to this Court's latest word on the subject, *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002).

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[8] The NASD also recognized the unfairness of limiting the availability of substantive remedies in arbitration when it proposed new rules governing the standards for issuance of punitive damages in NASD arbitrations. The NASD's proposed rules reflect the view that "it is not appropriate or feasible to eliminate the availability of punitive damages in arbitration so long as public customers are required by most member firms to sign predispute arbitration agreements." SEC Release No. 34-39371; File No. SR-NASD-97-47 (Nov. 26, 1997) (available at www.sec.gov/rules/sro/nasd9747.txt).

As the Court noted in *Howsam*, it has long been the rule that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,'" is generally an issue for judicial resolution. 123 S. Ct. at 591 (emphasis by the Court; citation omitted). Analytically, the question of arbitrability has two components: (1) whether the parties have a valid arbitration agreement; and (2) whether that agreement applies to the particular claim at issue. Although both questions are presumptively for the courts to resolve, this Court has held that the parties can under some circumstances agree that the second question is for the arbitrator to decide; and if they have so agreed, a court may compel them to submit to the arbitrator the question whether a particular dispute is subject to arbitration. *See First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938 (1995). Logically, however, the first component is necessarily one for the court, for if the parties have no valid agreement to arbitrate, they cannot lawfully be compelled to do so.[9] Thus, this Court has held that the question whether an arbitration agreement is unenforceable because it was induced by fraud is an antecedent question for a court to resolve. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). More generally, as the Court put it in *Howsam*, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." 123 S. Ct. at 592.

That is precisely the type of dispute involved in this case: The question is whether the respondents are bound by the arbitration clauses at issue, or whether they are unenforceable as to the RICO claims because they purport to waive substan-

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[9] *See, e.g. Volt Information Sciences, Inc., v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so ....").

tive rights that are otherwise available under RICO. *Howsam* dictates that such a dispute is for a Court to resolve.

Moreover, *Howsam* makes clear that the expectations of the parties are critical to the determination of whether an issue about whether a dispute is subject to arbitration is one for a court or an arbitrator to determine. As the Court put it, a "question of arbitrability" presents a "gateway question" for a court to resolve "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.*

Here, the parties would not likely have thought that they had agreed to allow the arbitrators to decide whether the contractual limitations on their authority were enforceable. On the contrary, the general expectation of parties to arbitration agreements is that arbitrators will abide by limits on their authority. Indeed, the Federal Arbitration Act expressly provides that one of the few grounds for vacating an arbitration award is that the arbitrators "exceeded their powers" under the parties' arbitration agreement. *See* 9 U.S.C. § 10(a)(4). The arbitration system simply does not contemplate that arbitrators will take it upon themselves to determine the validity of the arbitration agreements from which they derive their powers.

Moreover, the enforceability of a purported waiver of statutory rights and remedies is a purely legal question that arbitrators are in no way "comparatively better able" to resolve than a court. *Howsam*, 123 S. Ct. at 593. Indeed, it is an issue that only a court (and in particular, this Court) can definitively resolve, and nothing is to be gained by seeking the opinion of a panel of arbitrators on the question. Nor is there any point to permitting an arbitration to proceed under a possibly invalid agreement when the Court can avoid such a

waste of resources by deciding the enforceability issue at the outset. Thus, in this case, *Howsam*'s holding that "a fair and expeditious resolution of the underlying controversy" can best be achieved by assigning issues to the "decisionmaker with ... comparative expertise" points definitively to judicial resolution of the enforceability issue. *Id.*

Moreover, the petitioners' suggestion that the arbitrators' resolution of the enforceability issue can be adequately reviewed by the courts in the context of a post-arbitration challenge to their award only underscores that the matter is one for the courts, for at least two reasons. First, reliance on post-arbitration review is problematic because of the very narrow scope of judicial review of the merits of arbitrators' decisions. See 9 U.S.C. § 10. Second, arbitrators are not required to provide opinions explaining their decisions. Thus, if the arbitrators were to deny an award of treble damages, a reviewing court could well have no way of knowing whether the reason was that the arbitrators had concluded that the contractual prohibition on such remedies was enforceable, or that the arbitrators had decided the award was not warranted for some other, valid reason.

Finally, judicial resolution of the issue of enforceability before the case is referred to arbitration is consistent with the approach taken by this Court in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). There, the Court considered whether an arbitration agreement was unenforceable on the ground that it imposed unreasonable costs on a plaintiff seeking to assert a claim under a federal statute. Although the Court held that the plaintiff in that case had not succeeded in showing that arbitration under the agreement would be prohibitively expensive, the Court acknowledged that an agreement that precluded a litigant from "effectively vindicating her federal statutory rights in the arbitral forum" would be unenforceable. *Id.* at 90. More importantly for purposes of this case, the Court's consideration of the claim of unenforceability on its merits, before sending the case to ar-

bitration, confirms the common-sense proposition that determining whether an arbitration agreement is enforceable is necessarily antecedent to enforcing it. Petitioners' position does violence to that principle and should be rejected.[10]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[10] As a final fallback argument, petitioners suggest that even if the damages limitation is unenforceable, it should be "severed" and the remainder of the arbitration clause enforced. The Petition for Certiorari, however, did not say that petitioners would ask this Court to decide a severability issue. Even if the issue were properly before the Court, and even if it were assumed that a fundamental limitation on the powers of the arbitrators could ever be severed from the arbitration agreement, the question of the circumstances under which severance would be appropriate would presumably be a matter of contract law. Petitioners' assertion that the FAA requires a presumption of severability regardless of what otherwise applicable contract law principles would provide runs counter to this Court's recognition that the purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, but not more so." *EEOC v. Waffle House*, 534 U.S. at 294 (quoting *Prima Paint*, 388 U.S. at 404 n.12). Even on their own theory of severability, petitioners provide an insufficient analysis of relevant contract-law (and, for that matter, choice-of-law) principles to establish the appropriateness of severance.